

**National Park Service
National Center for Cultural Resources
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**IMPROVING THE ADMINISTRATION OF THE FEDERAL HISTORIC
REHABILITATION TAX CREDIT PROGRAM:**

**THE NATIONAL PARK SERVICE RESPONSE TO RECOMMENDATIONS
FOR IMPROVEMENT**

INTRODUCTION:

Over the course of 18 months, the National Conference of State Historic Preservation Officers (NCSHPO) and the Historic Preservation Development Council (HPDC) working with the National Trust for Historic Preservation (NTHP) have separately considered the National Park Service's current administration of the Federal Historic Rehabilitation Tax Credit Program and developed recommendations for improving that administration. NCSHPO formally approved its recommendations and transmitted them to NPS for further consideration and discussion in mid-summer of 2003. The Historic Preservation Development Council more recently transmitted its recommendations to NPS in January 2004.

After carefully analyzing the two reports, and in close consultation with the Office of the Solicitor, the National Park Service (NPS) prepared this paper, both as a response to the reports and as an initial work plan for improving program delivery for NPS and its partners. The Federal Historic Rehabilitation Tax Credit program has been and remains one of the most powerful and successful Federal tools to preserve our nation's historic inner cities and town centers. Clearly, the program can only continue to be successful if it is used. Therefore NPS is pleased that its partners and users have taken the time and effort to identify things that could be improved. Continuing efforts to evaluate and improve the program will ensure that it continues to be an effective stimulus in the years to come. The NPS is very proud of its administration of the Historic Preservation Income Tax Credits over the nearly 30 years since the program was first authorized by Congress. Over 31,188 properties have been certified by the NPS, amounting to \$31.43 billion. In addition, fully 97% of the submissions were certified in 2003.

This paper is written with the understanding that the reader is generally familiar with the reports from NCSHPO and HPDC, as well as with the administrative structure and procedures of the program as it currently exists. Consequently, there is no effort here to provide detailed program background information or to define terms and procedures.

SUMMARY OF HPDC, NCSHPO, NTHP REPORT RECOMMENDATIONS:

It is worth noting that, while the two reports do not necessarily agree with one another in the specifics of their recommendations, both make recommendations for change in three broad areas, as follows:

1. Application of the Secretary's Standards for Rehabilitation: Treatment Issues

Restoration?

Both reports called on NPS to avoid a perceived tendency to require "restoration" in a program for which "rehabilitation is the regulatory standard. Similarly, both reports called on NPS to avoid any tendency to require improvements to a project that meets the Rehabilitation Standards without those improvements.

Significance Considerations

HPDC also proposed a new flexibility in application of the Standards, keyed to a property's significance: least flexibility for nationally significant properties and greatest flexibility for locally significant properties. HPDC likewise called for more flexibility in dealing with interior spaces not normally seen by the public. HPDC called for a Federal/State/Private Sector task force "to develop a new approach to the use of the Secretary's Standards."

Experience

Importantly, NCSHPO noted that among its membership there is "general agreement that, in the vast majority of cases, the review process and application of the Standards was going very well."

2. Education and Training

Training

Both reports recommended increased NPS efforts in training all parties in the certification process. HPDC recommendations also noted the need for "cross-training" among all parties.

Outside Advice

HPDC called for a broadly representative task force to review all NPS guidance materials to ensure that the materials are not biased in favor of restoration.

Appeals Decisions

HPDC also specifically called for publication of appeals decisions as a way of disseminating additional information on acceptable treatments.

3. The Review Process.

Greater Involvement of States

Both reports recommend placing greater reliance on states in making final certification decisions. NCSHPO proposed a system for NPS certification of individual states and a limited “expedited review” by NPS of project decisions submitted by certified states. HPDC proposed a “demonstration program” of de facto project approval by the states: NPS would “approve” states and then be bound by decisions from those states for all but the largest projects and/or most historically significant properties. HPDC also proposed that the review of existing conditions for all projects be delegated to the SHPOs.

Application Forms

Both reports made various recommendations for changes to the application forms, themselves, and to the current “preliminary” review process, all in an effort to identify and clarify earlier in the review process the character-defining features of the structure and the significant treatment issues for each project.

Appeals Process

Both reports recommended changes in the appeals process. NCSHPO requested a more formal State role. The HPDC proposed either to replace or to augment the Chief Appeals Officer with a panel of Federal, state, and development community representatives. HPDC also called for NPS to hear Part 2 appeals for buildings not yet listed in the National Register.

Technology Enhancement

Both recommended greater reliance on emerging electronic information technology for submission and review of applications.

Increased Communication

HPDC made recommendations that would foster more direct communication between NPS and property owners.

SUMMARY OF THE NPS RESPONSE

The National Park Service appreciates the dedication and interest of the Historic Preservation Development Council, the NCSHPO and the NTHP in preparing these recommendations. As will become evident in the discussion below, NPS has taken the recommendations very seriously and has evaluated each one. More important, NPS accepts and agrees with the philosophy and approach that underlies each of the recommendations: that the Historic Preservation Tax Credits are a successful and powerful tool in the preservation of historic commercial or income-producing properties and that the public and private sector should work together as much as possible in identifying and correcting any and all barriers to their continuous and increased use.

1. Application of the Secretary's Standards for Rehabilitation: Treatment Issues

The National Park Service agrees that the standard established in the law is "...to certify rehabilitations..." not restorations. The general call for more flexibility in applying the Rehabilitation Standards is an important policy issue that deserves our best efforts, in consultation with our partners. Therefore, NPS proposes to establish a committee of the National Park System Advisory Board by October 1, 2004. Chaired by a member of the Board, the committee will be made up of appointees broadly representative of all of those who have a professional interest in the Secretary's Standards and how they are interpreted: NPS, SHPO's, architects, developers, local preservation commissions, and scholars. The committee will conduct its review and analysis by mid- to late 2005.

2. Education and Training


The National Park Service agrees that communication between all parties regarding the certification process, clarity of guidance and important decisions is essential to assuring that the certification process runs smoothly and that all parties have accurate and timely information. The NPS has committed to an expanded venue of training sessions, agrees to promulgate new material on the web and to accept suggestions for additional topics, and assure that information posted is accurate and timely. The recommendation for a task force to review materials to ensure an accurate portrayal of treatments as rehabilitation will be effected by October 1, 2004 with a target date for completion of the review by December 31, 2004. Finally, by July 1, 2005 the NPS will devise and begin implementing a plan for sharing appeals decisions on the NPS website.

3. The Review Process

The NPS recognizes that predictability and consistency in decision-making are a very significant factor for developers and owners involved in the rehabilitation of an historic structure. The NPS also recognizes that uncertainties can adversely influence the decision to pursue the historic preservation income tax credits and thus the potential for preserving historic structures. Therefore, the NPS is committed to improving the consistency and predictability of decisions and to improving public information about the existing consistency of response (82%) at the State and Federal level even as it strives to improve the record. While a review by the Solicitor's office has determined that greater decision-making by the states is not possible under existing law, the NPS invites

NCSHPO to establish a task force to work with the NPS to develop recommendations for the expansion of facilitated review and/or expedited review, electronic submissions, communication with parties, and participation in the Appeals process. Pending NCSHPO concurrence, the joint task force could complete its work by December 31, 2004. Work has already begun on guidance for requesting preliminary meetings on rehabilitation projects. The NPS will also pursue the issue of outside advice on Appeals matters.

A more detailed explanation of each of the recommendations and the NPS response with background materials follows.



THE NATIONAL PARK SERVICE RESPONSE

NPS appreciates the efforts made by each organization in preparing their reports. In order to prepare a response to all of the recommendations, NPS has examined its processes and statistical data, along with its continuing efforts to streamline and improve program delivery. In preparing this response to the NCSHPO and HPDC points of view, NPS has considered whether each recommendation represents a problem or need that can be addressed, a misperception that can be corrected, a disagreement that needs to be acknowledged, or perhaps even an issue that is unclear without more explanation. NPS has attempted to identify those recommendations that would require a change in the law, those that would require policy changes, and finally those that are simply administrative adjustments.

The NPS responses below do not attempt to provide a final answer to each and every recommendation made in the two reports. Some of the recommendations by their nature can be answered quickly, but others will require a continuing national discussion.

Background

In order to provide some context for considering and responding to the two reports, some statistical background may be useful.

- From 1981 until 1995, NPS review of Tax Act projects occurred in the NPS regional offices; appeals were decided in Washington, D. C. In 1994, the last full year of regional office responsibility for the program, the workload nationwide consisted of 1,900 Part 1/2/3 approvals, with 19 NPS FTE's [FTE = 1 person year] devoted to this responsibility. In 1994 the total value of construction work reviewed was \$640 million.
- In 1995, the NPS Director centralized this program in Washington in response to the recommendation of the National Park System Advisory Board's Historic Preservation Performance Review Committee.
- The program continues to grow. By FY 2003, a Washington office staff of 12 FTEs processed over 4,000 Part 1/2/3 approvals. In short, the caseload had doubled, and the caseload per FTE had tripled. The total dollar value of construction work reviewed in FY 2003 was \$2.7 billion, a quadrupling of the 1994 numbers.
- In the earliest years of the program, the percentage of projects denied was 6.6%. In the 5-year period of 1993-1998 the denial rate had dropped to 5.3%. In the 5-year period of 1999-2003 the denial rate dropped another 20% to 4.0%. In FY 2003, itself, the denial rate was under 3%.
- Processing, review, and decision time has dropped significantly over the years. In 1997 the time to review the project, collect and process the fee, and issue a decision averaged 65 days. As a result of recent program efficiencies, decisions on most projects are now completed within 30 days.

NPS Response to Specific Recommendations:

1. Application of the Secretary's Standards for Rehabilitation: Treatment Issues

All of the recommendations for change with regard to treatment issues, themselves, called for more NPS flexibility in interpreting the Rehabilitation Standards. In short, both reports expressed concern that NPS review staff requires more of property owners than is justified by the Rehabilitation Standards.

Discussion:

HPDC and NCSHPO Concerns

The HPDC report focused on the idea that NPS' overall philosophical approach to rehabilitation projects is simply too conservative. In assessing the attitude of NPS' project review staff, HPDC said the following:

Instead of viewing the historic credit as a "rehabilitation" tool that developers can use to breathe new life into old, often neglected commercial buildings, NPS staff has often taken a more conservative stance that strongly emphasizes the need for architecturally authentic "restoration" of properties. Reviewers are sometimes unrealistic in their requirements, prompting some developers to abandon their efforts to use the historic tax credit or not even pursue it in the first place.

HPDC also expressed the concern that, beyond questions of interpretation by NPS staff, recent revisions to the Standards, themselves, have made them more restrictive than the 1983 Standards. In particular, HPDC believes that the current Standards make the use of replacement materials "much more problematic" and less sensitive to the need to address other requirements arising from building and energy codes and from hazardous materials abatement requirements.

In short, HPDC expressed the view that "the federal historic tax credit program should be a tool for revitalization and adaptive reuse of buildings, not simply as a vehicle for architectural restoration."

HPDC's overall recommendation for addressing its concerns was to establish a task force whose mission would be to "develop a new approach to the use of the Secretary's Standards." That new approach would be based on a "graduated application scale" for the Standards, so that there would be a "broader range of acceptable options as building significance decreases." The end result would be that for most buildings exterior

1. Application of the Rehab Standards (cont'd)

treatments would receive the most attention by reviewers, while there would be “greater flexibility than is currently the case” in reviewing interior treatments.

NCSHPO focused its concerns and recommendations more on what it perceived to be certain NPS practices that call for more than the Standards require:

Insisting on the preservation of elements or fabrics that do not define the historic character and/or insisting on the restoration of missing elements may unnecessarily burden the overall economic feasibility of the project. . . . Although comments on the desirability to restore and/or even reconstruct deteriorated or missing elements can be suggested, no requirement to restore a feature of an otherwise eligible or listed property should be mandatory. . . . Professional suggestions to improve the quality of a project should definitely be offered if the design can still be modified, but any mandatory requirement to upgrade a marginal project that meets the Standards to one that better meets the Standards should be avoided.

NCSHPO also made a more specific recommendation that projects facing “unique and unusual circumstances” arising from other “progressive environmental movements” may require a more flexible approach based on the Section 106 philosophy of mitigating adverse effects, rather than on full adherence to the Secretary’s Standards.

NPS Response:

NPS fully acknowledges the seriousness of the concerns expressed by HPDC and by NCSHPO. The general call for more flexibility in applying the Secretary’s Rehabilitation Standards is an important policy issue that deserves our best efforts, in consultation with our partners, to determine in the months ahead whether significant changes are necessary and appropriate to meet the challenges and demands of the early 21st century.

The Standards and their basic interpretation were established a generation ago. Similarly, NPS’ basic application of the Standards to tax credit projects is firmly rooted in the fundamental guidance issued by the Associate Director for National Register Programs in 1982 in consultation with the Solicitor “to correct . . . misunderstandings”:

The Secretary is required by law . . . to certify rehabilitations that are ‘consistent with the historic character of the structure or the district in which it is located.’ This is the Secretary’s basic statutory mandate, and it cannot be waived for social, economic, technical, or other reasons. [T]he statutory test must be applied to every rehabilitation project in the initial review and in any subsequent appeal. . .

The word ‘rehabilitation,’ as used in the law does not mean that some form of historic ‘restoration’ is required. It is only necessary that a compatible use be found for the building which preserves its significant portions and features. The Secretary of the Interior’s ‘Standards for Rehabilitation’ are used to evaluate whether the historic character of the building is preserved in the process of

1. Application of the Rehab Standards (cont'd)

rehabilitation. [Emphasis original] The standards deal with the physical aspects of rehabilitation and do not reference either technical or economic feasibility except in such general terms as 'every reasonable effort' and 'whenever possible.' Project review . . . inherently takes into consideration certain economic and technical factors – such as whether to repair or replace deteriorated materials, or whether to accept certain selective demolition – but only to the extent that the actual work carried out on the building still is consistent with the historic character of the property or the district in which it is located.

The certification of rehabilitation work for tax benefits is inherently different from other historic preservation decisions, particularly those related to compliance with Section 106 procedures. . . There are no legal restrictions on the [Advisory Council's] comment – it can and sometimes does result in significant losses to historic properties, even total demolition. Tax Act review, however, produces a certification attesting that the historic character of the property has been preserved. In the final analysis therefore, the preservation of historic character takes precedence over social, economic, technical or other factors.

Do the Secretary's Rehabilitation Standards, as interpreted and applied by NPS, appropriately address the challenges facing developers who seek historic rehabilitation tax credits for projects that must be cost-effective and responsive to the market? Have times and conditions changed in such a way that the agreements, understandings, and expectations embodied in the Standards and their application to this program are in some measure out of touch with the realities of today?

Action:

To address this large question, NPS will establish a committee of the National Park System Advisory Board by October 1, 2004. Chaired by a member of the Board, the committee will be made up of appointees broadly representative of all those who have a professional interest in what the Secretary's Rehabilitation Standards say and in how they are interpreted: NPS, SHPOs, architects, developers, local preservation commissions, and scholars. The committee will make its recommendations through the Board to the Director of the National Park Service.

The committee's work and recommendations will address a series of policy-level questions, such as:

1. Are the Rehabilitation Standards, themselves, still appropriate to the challenges of today? Have the challenges facing developers of historic properties today fundamentally changed since the creation of the Rehabilitation Standards?
2. Are the Guidelines to those Standards clear, consistent with contemporary preservation thought on rehabilitation of historic buildings, and appropriately responsive to today's rehabilitation challenges?

1. Application of the Rehab Standards (cont'd)

3. Should the Historic Rehabilitation Tax Credit program modify its application of those Standards and Guidelines, as HPDC suggests, to provide for:
 - a. a conservative approach to highly significant structures and a much more lenient approach to less significant structures and to structures whose significance is historical rather than architectural?
 - b. a more lenient approach generally to the interiors of structures, while maintaining the current approach to exteriors?
4. Should the Historic Rehabilitation Tax Credit program modify its application of those Standards and Guidelines to provide for a more lenient approach to changes such as rooftop and other additions, where such changes are consistent with local policies to promote urban redevelopment and discourage sprawl?
5. Should the Historic Rehabilitation Tax Credit program substitute a Section 106-style “mitigation of adverse effects” test in place of the Standards and Guidelines, as NCSHPO suggests, for projects that provide some demonstrable public benefit but that cannot reasonably meet the Standards?

Discussion:

The committee’s work and the questions it addresses all look to the future. In establishing this “national conversation” about meeting the challenges ahead, NPS is not dismissing the various specific concerns raised by HPDC and NCSHPO about perceived NPS past and present practice. Rather, the specific concerns lead inevitably to the larger policy issues that will be at the heart of the committee’s work. Many of those specific concerns point to a valid policy issue that needs to be addressed, but the concerns, themselves, also appear to represent some level of misperception of the basis for current NPS practice.

In an effort to help make the committee’s work as fruitful as possible, NPS offers the following comments on the specific concerns set out above:

Rehabilitation vs. Restoration. In no case in the Tax Act program does NPS either intellectually or in practice impose a “restoration” standard rather than a “rehabilitation” standard on a project under review. This concern appears to focus on decisions related to repair and replacement of character-defining features. NPS decisions in this regard are based principally on Rehabilitation Standards 2, 5, and 6:

Rehabilitation Standard 2: The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.

1. Application of the Rehab Standards (cont'd)

Rehabilitation Standard 5: Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.

Rehabilitation Standard 6: Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

NPS decisions are derived from a reasonable application of the Rehabilitation Standards. At the same time, reasonable people can and do disagree on the specific application of these Standards. How important is a given distinctive feature? What level of deterioration warrants replacement rather than repair? At what level of deterioration does one conclude that a distinctive feature is simply gone? How much change can be accommodated within the requirement that the “historic character” must be preserved?

The challenge facing the committee will be to examine general approaches to large treatment issues to determine whether those general approaches can and should be modified to accommodate challenges in ways that still meet the statutory test for preserving historic character.

Current Secretary's Standards Are More Restrictive. The version of the Rehabilitation Standards currently used in the Tax Credit program was promulgated in 1990 as a part of 36 CFR 67. These Standards are a revision of those promulgated in 1983. The 1990 revision included two general statements of assurance that it represented no change of direction:

[Preamble] The Standards for Rehabilitation have been revised for clarity and improved comprehension but substantively remain the same in application.

[Rule] The application of these Standards to Rehabilitation projects is to be the same as under the previous version so that a project previously acceptable would continue to be acceptable under these Standards.

The 1990 revision of the Rehabilitation Standards did not impel the Tax Credit program to a more conservative, less flexible benchmark for approving projects. The 1990 revision includes a strong assurance that there was no such intent.

Restoration of Missing Features. It is not NPS policy to require the restoration of missing features from a building that is otherwise eligible for the National Register if, in fact, those features were missing prior to the property owner's ownership of the building. On the other hand, if character-defining features of a building are missing because the property owner has removed them, NPS certainly does hold the property owner

1. Application of the Rehab Standards (cont'd)

responsible for meeting Rehabilitation Standards 2, 5, and 6. Pursuant to those Standards, removing seriously deteriorated features that are beyond repair creates an obligation, not a blank slate. The Rehabilitation Standards call for “replacing” (note, not necessarily “restoring”) the features that were removed.

If there are examples where NPS acknowledged that in all other respects a project met the Rehabilitation Standards, but where NPS nevertheless imposed a requirement to replace distinctive features that were missing by the time of the property owner’s acquisition of the building, NPS encourages its partners and clients to point those examples out.

Suggest But Do Not Require Improvements to Approvable Projects. As with the question immediately above, it is not NPS policy or practice to require improvements to projects that already meet the Rehabilitation Standards. NPS certainly does – and the NCSHPO report makes clear that NPS should – make suggestions that in its view will result in a better preservation project. However, NPS fully agrees that it cannot validly require changes in a project that already meets, however minimally, the Rehabilitation Standards.

There are cases in which SHPO review staff and NPS review staff may disagree over whether a project, as proposed, meets the Rehabilitation Standards. Where the State concludes that a project minimally meets the Rehabilitation Standards, the State would obviously view any changes required by NPS as perhaps desirable but not necessary. However, NPS may have concluded that the project did not meet the Rehabilitation Standards, unless certain changes were made.

NPS encourages its partners and clients to point out any instances in which they believe NPS has inappropriately imposed this requirement.

Do Not Require Retention of Features that are not Character-Defining. It is not NPS policy to require property owners to retain features of a building that are not character-defining. This concern possibly arises more from disagreements over whether given features are in fact character-defining than it does from a belief that NPS acknowledges the insignificance of a feature but requires its retention anyway. Again, if there are examples of the latter, our partners and clients should point them out, because NPS agrees that such requirements would be inappropriate.

2. Education and Training

This section is divided into four parts:

- A. Training
- B. Accessible guidance documents and technical assistance
- C. Promulgate the most current version of the Secretary's Rehabilitation Standards
- D. Ensure that NPS materials emphasize rehabilitation and are free of any bias in favor of restoration

A. Training.

Discussion:

Everyone agrees on the need for more training for all parties in the review process. NPS also acknowledges that it must take the lead in developing an ongoing regimen of training opportunities that are readily accessible to those who need and want the training.

All of the recommendations presented in both reports are good ones:

Training for State staffs should occur more often than the current biennial cycle, and it should include regional sessions that do not require extensive travel by State staffs.

There should be more training tailored to the development community and delivered in forums that are routinely attended by the development community.

There should be more regular interaction among NPS, State staffs, and developers, not simply to share information but to promote greater understanding of each other's needs, challenges, and points of view.

For NPS, improvement of training along the lines noted above raises issues of time, money, and "getting it right." Obviously, carving out more time to devote to training is NPS' own challenge to address. Just as obviously, doing more training will cost more money, especially if NPS continues to pay the lion's share of travel costs for State staffs to attend NPS training. Re-examination and restructuring of the current fee structure likely would generate additional revenues from the very largest projects, some of which could be devoted to increased training and interaction. Finally, getting it right means working closely with the states and with the development community to ensure that subjects, locales, and frequency of training sessions meet the needs of their intended audience.

Action:

NPS has recently completed or is currently engaged to conduct the following training on applying the Rehabilitation Standards and Guidelines through June of 2005:

2. Education and Training (cont'd)

A. Training (cont'd)

- April, 2004: two half-day workshops at the Renovation and Restoration trade show in Boston (sessions drew audience of 150).
- April 26-28, 2004: Codes Conference in San Francisco sponsored by NPS on dealing with building codes in historic buildings (conference drew an audience of 200 architects, building owners, and consultants)
- April, 2004: training session at ALI-ABA conference in Washington, D. C. (session drew an audience of 125, mostly lawyers and some developers and property owners).
- June 10-11, 2004: two intensive workshops for architects at the AIA annual convention in San Francisco (sessions drew audience of 150) .
- September 29, 2004: day-long training session with the AIA Historic Resources Committee at the National Trust for Historic Preservation annual meeting in Louisville (session typically draws audience of 125).
- November 3, 2004: day-long training session at the Association for Preservation Technology annual meeting in Galveston (expected audience of 120 professionals in government and private section rehabilitation).
- November 11-12, 2004: annual Tax Incentives for Developing Historic Properties conference, this year in Boston. This 7th iteration of this workshop will draw 175-200 representatives from the development, finance, and architectural professions.
- June 2005 (tentative): biennial two-day NPS/SHPO training for State review staffs in Washington, D. C. The session will draw approximately 65 State staff members.

NPS also:

- Responded to invitations from HPDC to present Tax Act training sessions at HPDC meetings.
- Responded to invitations from the National Trust to present Tax Act training sessions at its annual Main Street meeting.
- Responded to invitations from 7 SHPOs or Statewide non-profits in the past year to present Tax Act training sessions at their annual statewide preservation meetings.
- Expects to participate in 3 or more state-sponsored training sessions in the coming year.

In addition to its existing efforts, NPS acknowledges that two specific requests from NCSHPO and HPDC need additional attention:

2. Education and Training (cont'd)

A. Training (cont'd)

NCSHPO asked for more frequent regional workshops in addition to the biennial meeting. NPS will consult with NCSHPO and by the time of the next national training session in June 2005 will determine the feasibility and potential schedule for regional sessions.

HPDC asked for more training tailored to the development community, as well as joint training among NPS, the SHPOs, and developers. NPS welcomes suggestions from HPDC, the National Trust, and other representatives of the development community on specific course content and on venues that would likely attract developers. In addition, NPS will consult with HPDC and NCSHPO on possible modifications to the June 2005 training session in order to provide for participation by the development community.

B. Accessible guidance documents and technical assistance.

Discussion:

NPS acknowledges that it can and should make existing guidance documents more readily accessible to property owners, developers, architects, and engineers. NPS also acknowledges that it can and should improve the technical assistance it offers on its website to prospective property owners.

Actions:

Over the years, NPS has developed a number of “Interpreting the Standards” (ITS) bulletins for use by SHPO staffs in reviewing rehabilitation projects. NPS is currently reviewing those bulletins and adapting them for posting on its website, so that they will be readily accessible to property owners. To date NPS has posted 28 ITS bulletins at its website, www2.cr.nps.gov. Twelve new ITS bulletins are currently being prepared and should be posted by December 2004. Most of the early ITS bulletins exist only as paper copies and will require more time to post on the Internet. NPS will continue to review these early bulletins with the goal of adapting and posting 45 of them on its website by June of 2005. Work on the remainder will continue as time allows after that date, but NPS will in the meantime make clear on the website that the materials are available to the public and not limited to SHPOs

We have just launched a new website called “Incentives!” that provides more information and more ease of navigation. The site covers both the application process and significant treatment issues. The site can be found at www2.cr.nps.gov/tps/tax/incentives/index.htm

NPS welcomes and will respond promptly to any suggestions or comments either on the new website in general or on specific topics for which additional information would be helpful.

C. Promulgate the most current version of Secretary's Rehabilitation Standards as a formal rule.

Discussion:

During the HPDC Working Group discussions, some questioned whether the Tax Act program uses the version of the Secretary's Standards that is published in regulation or some other, subsequent version that has not been formally promulgated for the program's use. NPS representatives were unclear during that discussion, and so contributed to the misperception that led to this recommendation.

The version of the Standards for Rehabilitation currently used by the Tax program was in fact promulgated as a part of 36 CFR 67 in 1990. All materials disseminated by the Tax program, and all reviews conducted by the Tax program use the Standards published in that rule. A separate publication, "Standards for the Treatment of Historic Properties (Preservation, Rehabilitation, Restoration, Reconstruction)" was first published by NPS in 1992 to replace the 1978 and 1983 versions of "Secretary of the Interior's Standards for Historic Preservation Projects." The 1992 publication was subsequently codified in Federal regulation at 36 CFR 68 to govern preservation projects assisted by grants from the Historic Preservation Fund. NPS materials make clear that this later publication/rule does not apply to the Tax program, which continues to operate under the rule 36 CFR 67 promulgated in 1990.

Action:

Because the Tax program currently uses the Rehabilitation Standards promulgated in 1990 in 36 CFR 67, no action is necessary to promulgate those Standards in rule. Further, there is no policy difference between the Standards promulgated for the Tax program in 1990 and those later promulgated for grant programs in 1995. On the other hand, to avoid any possible confusion, it may well be useful to conform the two versions of the Standards to one another. Consequently, NPS will consult with its partners and determine by the end of calendar year 2004 whether consolidating the two versions is desirable and feasible.

D. Ensure that NPS materials emphasize rehabilitation and are free of any bias in favor of restoration.

HPDC recommended that NPS amend the preamble to 36 CFR 67 to emphasize that the Tax program is “concerned with fostering ‘rehabilitation’ rather than ‘restoration.’”

Discussion:

That preamble contains 14 references to the Standards for Rehabilitation. The word “rehabilitation” (or a variant such as “rehabilitated”) is used an additional 57 times in the preamble, alone. The rule, itself, defines and subsequently uses only the terms “rehabilitation,” “Certified Rehabilitation,” and “Standards for Rehabilitation.” The word “restoration” appears nowhere in the preamble or the rule.

Action:

36 CFR 67 is already very clear on this point, without amendment. NPS recognizes that the point of HPDC’s recommendation is not so much to clarify confusion among the public as to remind NPS to avoid any resort to restoration standards. NPS looks forward to a public discussion of the various treatment issues of concern to HPDC and NCSHPO. However, adding another reference to rehabilitation in 36 CFR 67 will add nothing to that discussion, nor will it effect any change in the program.

Discussion:

HPDC further recommended that an interagency task force be convened to review all NPS guidance materials for the Tax program to eliminate any bias toward restoration found in those materials.

Action:

NPS welcomes HPDC’s second recommendation. Within 60 days of issuance of this report, NPS will convene a task force that includes State and private-sector representatives to make sure that all NPS guidance materials for this program refer only to rehabilitation treatments and not to restoration treatments. This task force should complete its work within six months.

E. Publish decisions of the Chief Appeals Officer.

HPDC proposed that NPS publish these decisions as a way of providing additional guidance to developers, architects, and SHPO and NPS review staffs.

Discussion:

The Chief Appeals Officer's decisions are public records that anyone is entitled to see. To the extent that these decision documents shed useful light on complicated treatment questions, NPS agrees that it should find some method for making the Chief Appeals Officer's decisions more easily available in a way that provides that useful guidance to the prospective property owner. However, neither NPS nor the Solicitor believes that simply posting the letters without explanation or context accomplishes that goal. The following concerns must also be addressed.

By way of background, the total caseload of Part 2 and Part 3 applications reviewed in FY 03 was 2,229. Of that number, only 51 or 2.3% were denied certification by NPS staff. Of those denials, only 30 or 1.3% went to appeal. NPS believes that treating these 30 cases as somehow more instructive or more important than the other 2,199 final decisions by NPS is misleading.

HPDC noted that the Chief Appeals Officer typically comes to a different decision from that of the review staff in two-thirds of the appeals. In reality, over the last 4 years the design change conditions proposed by the Chief Appeals Officer were in many cases the same as the conditions proposed by the review staff but rejected at that level by the property owner. Examined in that light, the Chief Appeals Officer came to fundamentally the same decision as the review staff about 60% of the time and came to a different decision in about 40% of the cases. In short, the number of times the Chief Appeals Officer's decision is fundamentally different from that of the staff represents under 1% of NPS final decisions.

In any event, treating appeal decisions as something akin to case law handed down by an appellate judge, or as something akin to IRS private letter rulings, also creates a significant misunderstanding of their official status. Appeals decisions do not establish policy for NPS, nor can they serve as binding precedents for similar cases in the future. The following guidance documents address the questions of precedent and policy:

From the current regulation 36 CFR 67.6: "Because the circumstances of each rehabilitation project are unique to the particular certified historic structure involved, certifications that may have been granted to other rehabilitations are not specifically applicable and may not be relied on by owners as applicable to other projects."

2. Education and Training (cont'd)

E. Publish Appeals Decisions (cont'd)

From Amoco Production Company v. U. S. Dept. of the Interior: “The Court rejects the attempt to bind the National Park Service’s discretionary authority to precedent. Each application must be viewed individually, and a reasoned decision must be made, with certification only upon a project’s consistency with the Secretary of the Interior’s Standards for Rehabilitation.”

From NPS internal guidance first issued by the Associate Director in 1982: “Although appeals may produce useful management by-products, such as drawing attention to areas where technical information or policy guidance may be needed, their basic purpose is to review the initial decision which applied the Standards to the rehabilitation proposal.”

From NPS internal guidance first issued by the Associate Director in 1984: “In general, the appeals process is not an arena for making preservation technology policy, but for review of . . . decision-making and application of the ‘Standards for Rehabilitation.’”

Finally, in their current format, the Chief Appeals Officer’s decision letters standing alone often are partial explications of the issues bearing on a given project, usually focusing only on issues raised on appeal. They often depend on the reader’s familiarity with the full case file in order to be useful for educational purposes.

Action:

All that notwithstanding, NPS agrees that more convenient access to appeals decisions may serve a useful educational purpose, if those decisions can be effectively presented within the larger context of all project decisions, if they can be effectively presented in a way that avoids misperception of their status, and if they can be presented in a way that allows the reader to understand full picture of the pertinent issues of the case. By July 1, 2005, in consultation with the Solicitor NPS will devise and begin implementing a plan for posting information on appeals decisions on its website.

F. Avoid giving tax advice.

The HPDC raised a concern that “some NPS personnel” have a tendency to offer tax advice that more properly should come from the IRS or a tax professional.

Discussion:

The report offers no specific examples of what HPDC considers improper, but it says NPS should restrict itself to design review and National Register eligibility.

NPS is already diligent in making clear to property owners that NPS staff are not tax advisors, and that property owners should seek such advice from appropriate professionals. NPS also routinely refers clients to the IRS website. On the other hand, it is impractical – and, frankly, unhelpful to property owners – to expect that NPS project review staff should scrupulously avoid any mention of the basics of how the tax credit works in this program. Taken literally, the HPDC proposal would leave NPS unable even to say that the credit is 20%, or that a property must be depreciable.

There is obviously a difference between explaining how a program works and offering specific tax advice. While explaining the basics of the program is an appropriate and helpful thing for NPS staff to do, NPS certainly agrees that its staff should not offer specific tax advice.

Action:

With this report, NPS management reminds tax project review staff that it must refrain from offering specific tax advice. NPS invites HPDC to provide any examples of where it believes NPS has offered inappropriate advice in the past, so that NPS can redouble its current efforts to avoid doing so.

3. The Review Process.

This section is divided into three parts:

- A. Greater Reliance on State Decision-Making
- B. Earlier Identification of Character Defining Features and Significant Treatment Issues
- C. Modify the Appeals Process

A. Greater Reliance on State Decision-Making

Background:

The National Park Service recognizes that predictability and consistency in decision-making is a very significant factor for the owner/developer. The NPS is committed to improving its 82% consistency rate with SHPO's to the degree possible. It is also true that the statutorily-mandated two-tiered process inevitably leads to some instances where the final decision from NPS varies in some measure from the recommendations made by the state. In rare cases, NPS denies projects for which the State recommended approval. More often, though still infrequently, NPS modifies in some way the conditions proposed by the SHPO as necessary to bring the project into conformance with the Secretary's Standards for Rehabilitation.

However, in most instances NPS agrees fully with the state's recommendations. Some numbers are illustrative. From October 1, 2003 (the beginning of the 2004 Fiscal Year) until early February 2004 (when preparation of this report began), NPS received 401 Part 2 applications. In 324 cases, or 81%, NPS agreed completely with the recommendations (including 2 denials) made by the state. In 60 cases, or 15%, NPS added at least one condition to those proposed by the state for approval. In 8 cases, or 2%, NPS eliminated one or more conditions proposed by the state for approval. In 6 cases, or 1.5%, NPS denied a project had recommended for approval with conditions. In 2 cases, or 0.5%, the SHPO recommended approval of the project with no conditions, and the NPS denied the project. NPS denied 1 project submitted by the SHPO without any recommendation.

While the HPDC report advanced a perception that NPS and SHPO offices are often at odds with each other with developers caught in the middle, the existing two-tiered system currently results in a generally high level of consistency between State recommendations and NPS decisions.

With this background the two recommendations for greater reliance on State decision making can now be examined.

1. The Review Process (cont'd)

A. Greater Reliance on State Decision-Making (cont'd)

- **HPDC PROPOSAL FOR A MODEL PROJECT THAT ALLOWS STATES APPROVED BY NPS TO TAKE ON FINAL DECISION-MAKING AUTHORITY FOR ALL PROJECTS VALUED AT \$2.5 MILLION OR LESS.**

Discussion:

Implementing this proposal would require statutory changes, as the Internal Revenue Code requires that the Secretary of the Interior certify the projects. The National Historic Preservation Act describes the SHPO role as assisting in the certification process. In 1992 the Congress specifically considered an amendment to the NHPA that would have allowed the Secretary to delegate final certification responsibility for these (and other) decisions to the SHPOs. Congress rejected that amendment.

In considering the NCSHPO and HPDC reports, the DOI Solicitor's Office reaffirmed that the existing language of the NHPA and the Internal Revenue Code does not allow for delegation of the Secretary's decision-making authority. The Solicitor advises further that a system in which the states continue to submit the projects to NPS for final approval, but in which NPS is required to accept the state's decision is de facto delegation of decision making and likewise not permissible under current law.

Action:

Under the current law no action by NPS to implement this HPDC proposal is possible.

SHOULD THE LAW BE CHANGED?

Discussion:

If legislation were to be introduced to allow for delegated decision making, the Administration would develop a position on the bill at that time. Consequently, neither NPS nor DOI currently has a position on this issue. However, it is fair to say at present that NPS is not persuaded that there is a major problem that requires a statutory solution. The program statistics noted above simply do not bear out that picture. It is also worth noting that the NCSHPO report on this same topic concludes that, while there are ways to improve program delivery, the two-tiered system is fundamentally sound and works well.

Nevertheless, one must acknowledge that decision making at either the State level or at NPS would be simpler and probably more expedient than the current two-tiered review. However, under current conditions, it is NPS' considered opinion that relying only on NPS or only on the states to carry out the project review function and make final decisions would create budget and workload burdens that neither party could bear in the near future. Eliminating the SHPOs from the program would require major increases in NPS staff, as well as major increases in effort and expenditure to provide the direct client service the states now provide. Such a change would also be contrary to the

1. The Review Process (cont'd)

A. Greater Reliance on State Decision-Making (cont'd)

intergovernmental partnership that is at the heart of the National Historic Preservation Act.

Delegating final decision making to the states – even with HPDC’s proposed caveats that the State must want the delegation and NPS must approve the State inevitably raises issues of national program consistency. In addition, present spare resource allocations would likely not cover the expenses necessary for such an action. While final decision making by NPS has led to a high level of consistency between SHPO recommendations and NPS decisions, the withdrawal of NPS from approximately 80% of the program’s caseload (pursuant to HPDC’s definition of “small” projects) would almost surely lead to some level of variation among the states in how they apply the Standards. Those variations could also be at odds with NPS interpretations in those states where certification authority has not been delegated to the state. Further, if, as HPDC proposes, NPS remains responsible for the very large and very significant projects in a given State that otherwise administers the “small projects,” the possibility of different interpretations with the same State is real. The emergence of some level of inconsistency in the national program may be acceptable to some and not acceptable to others, but it is an important question that would need to be addressed from a public policy perspective.

The questions of State staff capacity and national program administration are not insignificant. On their face the HPDC proposal’s caveats that a State must request delegated authority and NPS must approve the state’s capability are reasonable accommodations and protections. However, for this particular program work loads, staff capacity, and experience at the State level vary tremendously, and turnover is significant. Again, some current numbers are illustrative. At present:

- Only 23 states review more than 10 Tax Act projects a year.
- Only 17 states have more than one staff member devoted to Tax Act project review.
- At NPS’ training workshop for State review staff in June 2003, 33 of the 58 State reviewers in attendance identified themselves as being in their first or second year with the program.

While the minority of states with relatively large caseloads and relatively stable project review staffs could expect to meet any reasonable standards NPS would establish for delegating authority, the majority of states would either never qualify for delegation or would face a cycle of delegation and revocation resulting from staff turnover. The questions of who wants the delegation and who is qualified to have it would be regularly revisited and would produce ever-changing results.

1. The Review Process (cont'd)
A. Greater Reliance on State Decision-Making (cont'd)

Action:

NPS does not propose to initiate legislation that would be necessary to implement the HPDC proposal for delegation of authority. As noted above, NPS is not persuaded at the present time that there is a problem that requires this legislative solution. NPS also notes that the NCSHPO report on this topic did not recommend full delegation of certification authority to the states. In sum, NPS believes that the search for improvements in program delivery at the present time more fruitfully takes us down paths other than delegation of final decision-making authority in whole or in part to the states.

➤ **HPDC PROPOSAL TO DELEGATE REVIEW OF EXISTING CONDITIONS TO SHPOs**

Discussion:

The existing condition of an historic building about to undergo rehabilitation is a critical component in determining what rehabilitation treatments will lead to certification for tax credits. HPDC indicated that it is often difficult to convey fully and accurately through photographs the condition of a building before rehabilitation. To remedy this problem, HPDC proposes delegating the review of existing conditions to the SHPOs and providing fee revenue to the SHPOs to cover the costs of site visits necessary to perform this review. There is no question that reports from SHPO site visits are a valuable source of information that can augment and explain photographs submitted by the property owner. NPS already puts great credence in any SHPO report on a building's condition, so NPS certainly wants to do whatever is necessary to ensure that State staff is able to make a site visit in any instance where such a visit would lead to a clearer understanding of the project. However, it is important to note that such effort by the State would be additional fact finding, not a determination or final decision pursuant to delegated authority and thus legally beyond question.

NPS believes that states could be compensated by property owners to cover the costs of such site visits. NPS has previously ruled that SHPOs may not charge a fee for processing an application and submitting it to NPS. However, because a site visit by the State staff, at the discretion of the state, would constitute an extra service to the property owner, a property owner could appropriately cover the travel costs necessary to make the site visit.

Action:

NPS will notify SHPOs that they may accept travel expense reimbursements from property owners to cover reasonable costs of site visits to projects seeking rehabilitation tax credits. NPS will post similar information on its website and will add any necessary clarifying language to the Historic Preservation Fund Grant Manual.

1. The Review Process (cont'd)
A. Greater Reliance on State Decision-Making (cont'd)

Within 3 months of issuance of this paper, NPS will post on our website additional guidance questions to assist State staffs and property owners in documenting the pre-rehabilitation condition of the building.

➤ **NCSHPO PROPOSAL FOR NPS “EXPEDITED REVIEW” OF PROJECTS BASED ON CERTIFICATION OF STATES OR OF INDIVIDUAL REVIEWERS**

Discussion:

NCSHPO’s proposal for “expedited review” calls for NPS certification of individual SHPO staff members based on a demonstration of 5 years’ experience in the private and/or public sectors and attendance at 3 NPS tax act reviewer workshops. Projects reviewed by certified reviewers would then be subject to review by NPS only on the basis of items (if any) identified by the State on an expedited review sheet.

NCSHPO noted that NPS already has a similar “facilitated review” process, which provides the states with a form to set out project issues, proposed conditions, and an overall recommendation. NPS can then simply sign that form to concur in the state’s recommendations. As a matter of current practice, NPS “signs off” on the facilitated review sheet after a cursory review of the application in many cases. cursory review and quick NPS sign-off generally result now where NPS and a given State staff have established a strong working relationship, and where the State has done a thorough job of identifying issues and conditions on the facilitated review sheet.

There are two apparent critical distinctions between the existing “facilitated review” and the NCSHPO proposed “expedited review.” Expedited review calls for a formal certification of State staffs based on length of experience. Expedited review also formally limits NPS’ review of a project to those items and issues identified by a certified State staff member.

NPS welcomes the opportunity to work with the states to improve or make greater use of the “facilitated review” process, or to develop a more formal “expedited review” process with the aim that even more projects can be quickly approved by NPS based on State recommendations and cursory NPS review. Because NPS would continue to be responsible for final decisions based on some agreed level of documentation, no change in the statutes would be necessary.

However, in seeking to extend and formalize NPS reliance on State recommendations, there should be a caveat for future discussions. A State’s proficiency for these purposes must be track record, not simply length of staff experience and training. An experienced reviewer may still, for whatever reasons, make project recommendations with which NPS may disagree in whole or in part. Regardless of “time served” and workshops attended, if

1. The Review Process (cont'd)

A. Greater Reliance on State Decision-Making (cont'd)

a reviewer's experience is characterized by a pattern of such recommendations, NPS could not in good conscience "certify" that reviewer and routinely approve projects with little or no NPS review. On the other hand, using a measure that is an ongoing gauge of how often State recommendations are accepted by NPS offers a more defensible basis for placing greater reliance on those recommendations.

Action:

NPS invites a NCSHPO task force to work with NPS staff to develop recommendations for the expansion of facilitated review and/or implementation of expedited review. Pending NCSHPO concurrence, the joint task force should report its findings to the NCSHPO annual meeting in March, 2005

B. Earlier Identification of Character-Defining Features and Significant Treatment Issues.

Both reports recommend revising administrative practices to ensure the earliest possible identification of a building's character-defining features and those treatment issues that may "make or break" the project's eligibility for tax credits. NPS is fully supportive of the goal. In addition to looking at the recommendations made by HPDC and NCSHPO, NPS, the states, and the development community must do more to educate property owners, developers, architects, and engineers about the benefits of initiating the review process while the project is still in its early design stages. One statistic is particularly telling: of the 51 projects denied certification by NPS in FY 03, 38% were already completed when submitted for NPS review, and an additional 51% were substantially underway at the time of NPS' review.

➤ **"PRELIMINARY REVIEW"**

Discussion:

HPDC called for making greater use of the existing "preliminary review meeting," so that it becomes a "standard option" for any property owner. NCSHPO called for formalizing the preliminary review to clarify how and when it can be used.

At present, the option for a preliminary meeting prior to submitting a formal project application is probably not widely known among the development community. The idea of a preliminary meeting was conceived as an opportunity for the State to initiate early consultation with NPS on impending projects that could present significant or complicated issues. Consequently, preliminary meetings among NPS, the states, and property owners now occur only when the State asks for them; the property owner cannot unilaterally request the meeting. Further, such a preliminary meeting is designed to deal conceptually with a limited number of significant design or treatment issues; it is not intended as a forum for final agreements or as a de facto approval of the entire project.

NPS is committed to ensuring that all property owners have ready access to all the guidance they need – including, as necessary, a preliminary meeting – in order to plan a rehabilitation project that will qualify for tax credits. Where that guidance reasonably includes a preliminary meeting with NPS and the State to discuss significant issues, a property owner should be fully aware of the option for requesting such a meeting, and NPS and the State should accommodate that request.

1. The Review Process (cont'd)

B. Earlier Identification of Character-Defining (cont'd)

Action:

NPS has already begun preparing guidelines for requesting a preliminary meeting, with the goal of completing the draft by October 1, 2004. NPS will circulate those guidelines in draft for comments. Once final, NPS will disseminate the guidelines through various means, including a posting on the website. NPS will include reference to the preliminary meeting in any subsequent revisions of the application form.

Developing and disseminating guidelines for preliminary review will lead to a measurable increase in its use. The guidelines must clearly spell out the circumstances in which such a preliminary meeting is appropriate. NPS would necessarily have to reserve the right to determine that a given request is not consistent with the guidelines. Preliminary meetings cannot become a vehicle for circumventing the principal relationship between property owner and the SHPO, nor can it be a vehicle for circumventing the relationship between NPS and the SHPO. States should continue to participate in the meetings and should have either prior or simultaneous access to any information presented to NPS.

➤ **AMEND THE APPLICATION FORM**

Discussion

Both NCSHPO and HPDC recommended that Part 1 (Certification of Significance) of the application form be amended to require property owners to list what they believe are the character-defining features of the building, so that, once NPS approves the Part 1, NPS could not at a later point in the review process identify additional character-defining features that need to be protected. In approving the new Part 1, NPS would, in effect, be agreeing not to raise other issues not related to those features in the approved Part 1. It is worth noting that such a change would establish a Part 1 requirement for individually listed buildings where none exists today.

It is worth noting that the Part 1 application already asks the property owner to describe all “distinguishing architectural features” of the property, not as an approvable list that will govern the subsequent project review, but simply as information in support of the building’s significance. NPS’ experience has been that the quality of these descriptions has been inconsistent.

Encouraging a property owner to think in these terms early on is good, and establishing the boundaries for NPS’ subsequent review of the project has obvious benefits for the property owner. However, converting the existing request for information into an item that must be individually reviewed and approved as accurate would require significant additional investment for all parties. If this additional investment of time and effort up front reasonably leads to a significant reduction of “surprises” later in the review process, the investment is obviously justified. In that regard, it is worth noting that, while the aim of this amendment is the early establishment of the framework for subsequent review of

1. The Review Process (cont'd)

B. Earlier Identification of Character-Defining (cont'd)

Part 2s, Part 1 applications do not necessarily come to Part 2s, Part 1 applications do not necessarily come to the State or to NPS any earlier than Part 2 of the application. In the 401 FY 04 projects NPS reviewed in preparing this report, 131 were a combined Part 1 and Part 2 application. Another 41 were individually listed buildings that required no Part 1. Finally, as noted above, 89% of the denials in FY 03 were projects that were underway or completed by the time of NPS review, so that identification of character-defining features during the planning phase would not have been possible in any event.

Action:

While there is considerable benefit in identifying a building's character-defining features when planning a rehabilitation, NPS believes that incorporating such a list in the Part 1 application would add considerably to the burden on the property owner and on the State and NPS review staffs without necessarily leading to an earlier consideration of these features than is now true in practice. Consequently, NPS does not propose to pursue possible amendments to the Part 1 application. However, NPS will explore with its partners whether such a list of character-defining features should be added to the Part 2 application. (See below.)

Discussion

NCSHPO also recommended amending the Part 2 application to identify better the most important treatment issues to be addressed. If the Part 2 application can be amended in ways that emphasize the importance of certain treatments as "make or break" issues, such a change likely would be helpful information for property owners. On the other hand, for many projects the treatment questions are not limited to a handful of individually significant issues: the cumulative effect of many "lesser" treatment decisions can also make or break the project. Amending the Part 2 form to include a list of most important treatment issues must carefully avoid creating the expectation that nothing else about the project will be reviewed.

In any event, if there are changes to the application forms that will improve the process and increase the likelihood of successful outcomes, NPS is anxious to consider those changes in consultation with the states and the development community.

Action:

NPS will actively consult with its partners on the specific question of whether the Part 2 application can be improved in any way, and specifically through listing character-defining features and significant treatment issues. NPS will make its recommendations for change, if any, by the end of calendar year 2004.

C. Modify the Appeals Process.

Discussion:

The NCSHPO proposal calls for “clarification” that would “Allow the states an official role in the appeal process that allows incorporation of unique and unusual factors that affect the project.” Viewed simply as a matter of process, SHPOs are already welcome to attend and participate in appeal meetings and to submit any written materials for the record. The only existing limitation, pursuant to advice from the Solicitor, is that the property owner cannot pay the SHPO’s expenses to attend the appeal meeting. If this fact is not widely known among SHPOs, then NPS will issue a reminder. If the NCSHPO report envisions a larger procedural role for the SHPO, it is not clear to NPS what that role is.

However, the context within which this recommendation appeared in the NCSHPO report suggests a concern more related to treatment issues discussed above. NCSHPO suggests that application of the Rehabilitation Standards needs to be “within a framework that recognizes local or State policies aimed at quality-of-life issues. . .” Further, where the SHPO determines that unique and unusual factors justify mitigation to minimize adverse effects, NPS should accept that determination and review the project accordingly, both at the staff level and on appeal. See again the Associate Director’s directive quoted on pages 8-9 above.

Action:

NPS will issue a letter to all SHPOs to remind them that they are welcome to participate in an appeal meeting, either in person or by telephone, and that they are welcome to submit any written statement they wish for consideration by the Chief Appeals Officer.

Discussion:

a. Advisory Board. The HPDC report recommended a fundamental change in the appeals process: establish “an Independent Advisory Board . . . to hear appeals.” Such a board would be composed of Federal, state, and private sector representatives. HPDC notes that under current circumstances the Chief Appeals Officer has “no choice but to consult with . . . the [NPS] design reviewer(s) who denied the Part 3 application.” Given the specific concern cited by HPDC, it is unclear whether the proposed Board is intended to replace the Chief Appeals Officer or simply to advise the Chief Appeals Officer. In any event, it is important to note that, as routine practice, the Chief Appeals Officer does not consult either with the original NPS case worker or with the manager who signed the denial letter, precisely to avoid the concern raised by HPDC.

If the HPDC proposal seeks to vest this appeals panel with decision-making authority, the proposal constitutes delegation of the Secretary’s responsibility. For the reasons cited

1. The Review Process (cont'd)
C. Modify the Appeals Process (cont'd)

above, the Solicitor's Office affirms that such a delegation is not possible without amending the appropriate statutes. If HPDC is instead proposing a vehicle by which the Chief Appeals Officer could receive advice from parties outside NPS, NPS is open to further discussion on the value and feasibility of such a proposal.

Whether decision-making or advisory, a panel such as proposed by HPDC would be subject to the Federal Advisory Commission Act. Its meetings would be public and would require prior published notice in the Federal Register at least 15 days prior to any meeting. The simple mechanics of convening the group would inevitably create a slower, more ponderous, less flexible appeals process. Under the circumstances, some less formal mechanism for providing advice to the Chief Appeals Officer might be worth exploring.

Action:

NPS will consult actively with its partners and the Solicitor's Office in order to determine within 6 months of issuance of this report the desirability and feasibility of some less formal process by which the Chief Appeals Officer can solicit advice from individuals other than NPS and State officials. NPS does not propose to pursue creation of an independent advisory board to hear appeals. Creation of a panel with authority to decide appeals would require a change in the statute. Creation of a panel to advise the Chief Appeals Officer would also necessarily establish a far more cumbersome and time-consuming appeals process than the current one.

Discussion:

b. Appeals of Denials of Preliminary Part 2 Certification. HPDC proposed that NPS be required to hear appeals of Denials of Preliminary Part 2 Certification for buildings not yet listed on the National Register, because a state's willingness to proceed with a nomination may in some cases depend on the outcome of the rehabilitation. Under the current regulations the right to appeal a Part 2 denial is limited to owners of properties already on the National Register. For properties not yet on the Register, the regulations do provide that the Chief Appeals Officer, in his or her discretion, may grant the owner an "administrative hearing."

Action:

NPS agrees with HPDC that any property owner whose Part 2 application has been denied should have access to the Chief Appeals Officer. Effective with the issuance of this report, and continuing recent practice, the Chief Appeals Officer will routinely grant any request for an "administrative hearing." NPS will ensure that its notifications of denial for all Part 2 applications inform the property owners of their access to the Chief

1. The Review Process (cont'd)
C. Modify the Appeals Process (cont'd)

Appeals Officer. NPS, in consultation with the Solicitor, will subsequently make any appropriate changes to the regulation to formalize this change.

Discussion:

c. Publication of Appeals Decisions. HPDC recommended that decisions of the Chief Appeals Officer be published.

Action:

Since this proposed change is not so much procedural as it is educational, it is discussed in Section 2 above.

1. The Review Process (cont'd)
D. Greater Reliance on Electronic Technology

D. Greater Reliance on Electronic Technology.

Discussion:

Both reports urged NPS to accept application materials, including photographs, electronically. NPS agrees in principal and, consistent with The President's Management Agenda 2002 to allow for electronic transactions between the government and its clients, has already begun to move in that direction. There are a number of technical and logistical issues to address, as HPDC noted in its comments on developing standards for digital photos.

Action:

NPS will initiate consultation with its partners by October 1, 2004, and will develop and disseminate guidelines for electronic submittal of materials in 2005.

E. Simultaneous Communication with the SHPO and the Property Owner

Discussion:

HPDC pointed out that in the current review process NPS communicates with the SHPO, who then communicates with the developer. Such a “circuitous” communications process can lead to delays and misunderstandings. HPDC recommended that all communications from NPS be transmitted simultaneously to the SHPO and to the developer.

Under current regulations, property owners submit all project materials to the SHPO, not to NPS. The SHPO then conducts a substantive review and makes a recommendation to NPS. NPS relies heavily on the review by the SHPO, and the regulation affirms this reliance by stating that NPS “generally” follows the SHPO’s recommendation. As a result, NPS places great value on its working relationship with SHPO review staffs. NPS also recognizes and appreciates that SHPO staffs expend considerable effort to maintain productive working relationships with developers active in their respective states. On the other hand, current regulation does not specify that NPS recommendations and decisions are to be transmitted to property owners through the SHPO. Certainly, all written NPS decisions or recommendations for project modifications are sent directly to the owner, with a copy to the SHPO.

At issue, then, are those cases that involve informal communication and negotiation after NPS has received an application and before NPS issues a written recommendation or decision. Some states want to remain the developer’s point of contact after the project has been submitted to NPS by the SHPO. Other states prefer instead to “turn the project over” to NPS once they have conducted their review and made their recommendation.

As a matter of informal practice, NPS has deferred to State wishes in this regard. Further, because the regulation anticipates and the record confirms that NPS relies heavily on SHPO recommendations, it is normal and important in complicated cases that NPS staff discuss SHPO recommendations with the SHPO staff, if questions arise. At the same time, communicating informally with the property owner through the SHPO can create the possibility that NPS’ concerns will be misunderstood.

Action:

NPS greatly appreciates and relies on the work done by SHPOs with property owners to refine projects before they are submitted to NPS. The ongoing working relationships between SHPOs and property owners contribute significantly to successful preservation outcomes, so NPS should avoid taking actions that compromise those relationships. At the same time, a property owner whose application has been submitted to NPS is entitled to hear any NPS concerns promptly and clearly. NPS will consult with those SHPOs that

have a particular concern for this issue and by April 1, 2005, will implement any feasible changes that best address both needs.

Conclusion

NPS will begin immediately to implement the actions and make the changes promised above. While some of those actions and changes should address the concerns raised, many others call for continuing discussion between NPS and its partners on whether and how to make changes. NPS looks forward to those discussions, confident that program improvement will be the result.